

ARMENIA IN THE REGIONAL CONTEXT

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BELT & ROAD INITIATIVE AND THE INCREASING RELEVANCE OF ARMENIA-CHINA BILATERAL INVESTMENT TREATY

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Abstract: The Belt and Road Initiative (BRI) was announced by Chinese President Xi in September 2013, with the goal of creating robust continental and maritime trade and investment infrastructure connecting Eastern Asia to Western Europe. Armenia is considered one of the countries situated directly on the roadmap of BRI, which introduces an opportunity to deepen Armenia-China investment relations, attracting Chinese capital for infrastructure and greenfield investments in Armenia. The Armenia-China bilateral investment treaty (BIT) signed in 1992 will govern the private and public investment initiatives between Armenia and China, and there is a growing need to re-examine the protection standards contained in the BIT with the objective of renegotiating and updating the treaty. Armenia-China BIT contains substantive and procedural protection standards for foreign investors that are considerably outdated. In order to facilitate and promote investment relations between Armenia and China, the parties need to draw particular attention to this fundamental document which lays out a framework of protection for investments between the countries.

Keywords: *Belt and Road Initiative; Armenia; China; Bilateral Investment Treaty; Investment protection.*

Introduction

Since its independence, Armenian foreign policy has been called “multi-vectorism,” usually defined as complementary diplomacy, which has dominated Armenia’s post-Soviet foreign policy.¹ Complementary diplomacy assumes that Armenia has attempted to maintain a balance between the international and regional powers that are actively involved in the South Caucasus region (where Armenia is located). Thus, Armenia has joined and participated both in pro-Russian initiatives and in pro-

¹ Richard Giragosyan, “Towards a New Concept of Armenian National Security,” *Armenian International Policy Research, Working Paper No. 05/07* (Jan. 2005).

Western initiatives, by becoming a part of Russian lead Collective Security Treaty Organization, Eurasian Economic Union and intensifying its cooperation with the EU.² Although participation and contribution in seemingly opposing interests, this fact is a result of Armenia's historical and geographical considerations.³ This meant balancing the inherently conflicting interests of Russia and the West, while at the same time building strong economic and political ties with its immediate neighbours such as Iran and Georgia, and rising economic superpowers such as China⁴.

China was one of the first countries to recognize the independence of Armenia on December 27, 1991, which was followed by the establishment of diplomatic relations between the states on April 6, 1992. Since the 1990s, the two countries have established trade relations that have seen rapid growth and development along with the development of Armenia and China's rise to the status of a global economic giant.

In 1999 in particular, Armenia's imports from China amounted to 0.6% of its overall imports, which was equivalent to US \$238,000. In the 1990s, Russia and the USA had a dominant share in imports to Armenia, with 55% of overall imports. China's share in overall imports to Armenia stayed below 1% until 2004. These statistics have changed considerably in the past decade. Armenia's imports from China increased to 10% in 2010, and in 2016 it reached 11.29% - its highest share to date. Russia continues to maintain its predominance in Armenian imports with a 30% share and China comes in second. Thus, within last two decades, Armenian imports from China have increased from \$US 238.000 to \$US 364 million, which is 1,500-fold growth, and China has moved from 21st place to become the second biggest exporter to Armenia.⁵ Equally significant has been Armenia's exports to China. In 1999, China had a 0.03% share in overall Armenian exports, which grew to 11.21% in 2015, with overall exports amounting to \$US 165 million. It has seen more than 1000-fold increase, which is a strong indicator of the increasing importance of China in Armenian foreign trade.⁶

²Sergey Minasyan, "Multi-vectorism in the Foreign Policy of Post-Soviet Eurasian States," *Demokratizatsiya* 20, no. 3 (2012): 268.

³ Ibid.

⁴Richard Giragosian, "Toward a New Concept of Armenian National Security," 16.

⁵ World Integrated Trade Solutions (WITS), Armenia Import Partner Share in percentage for all countries and regions between 1997 and 2016, <https://wits.worldbank.org>; see also Statistical Committee of the Republic of Armenia, <http://www.armstat.am/en/>.

⁶ WITS, Armenia Export Partner Share in percentage for all countries and regions between 1997 and 2016, <https://wits.worldbank.org>.

Notwithstanding the rapidly developing trade relationship between Armenia and China, Chinese Foreign Direct Investments (FDI) in Armenia have not surged during the same time period. This can be explained by the fact that South Caucasus region has not been a foreign policy priority for China,⁷ and investment relations with South Caucasus countries such as Georgia and Azerbaijan have been relatively identical to that of Armenia.⁸ In 1998, Ambassador Extraordinary and Plenipotentiary of China to Armenia mentioned that since its independence, the countries have developed cooperative and friendly relations and mentioned that China supports the efforts of Armenia to develop its economy and called for deepening their commercial relationship.⁹

China has seen staggering growth since the adoption of the “open door” policy in 1987, and within past 30 years it has grown to become the world’s second-biggest economy, the biggest exporter of goods and services worldwide, one of biggest destinations of global FDI and one of the biggest contributors of outward foreign investment. However, China’s economic, commercial, trade, investment, and even political significance for Armenia is one of the most overlooked topics in the modern academic literature regarding law, economics, and social sciences relating to Armenia. In fact, there is little academic literature discussing Armenia-China commercial relations, and that which does exist was mainly published before 2014.

Particularly, in an article published by Chalmyan has discussed the history of Armenia-China political, economic, and cultural relations between 1992 to 2007,¹⁰ Sarajyan discusses the level of cooperation between the countries until 2012 in the context of Sino-Georgia and Sino-Azerbaijani relations.¹¹ A dissertation published by Sargsyan discusses the Sino-Armenian relationship from 1991-2010 in the context of Chinese

⁷David Pipinashvili, "Sino-Russian Geopolitical Interests in Central Asia and South Caucasus," *Bull. Georg. Natl. Acad. Sci* 5 no. 2 (2011).

⁸ See for example a detailed FDI statistics data retrieved from UNCTAD, “Bilateral FDI Statistics 2014,” *Yearbook* (2014) (available at http://unctad.org/Sections/dite_fdistat/docs/webdiaeia2014d3_ARM.pdf (Armenia));

⁹Yan Kejun, (Ambassador Extraordinary and Plenipotentiary of China to Armenia) speech, “The International Situation and the Foreign Policy of China,” *AUA*, May 14, 1998.

¹⁰Noubar Chalemyan, Hay-ĉinakan haraberutyunnerĕ 1992-2007 t’ t’ (in Armenian), Armenian-Chinese relations between 1992 and 2007, *Banber Yerevani hamalsarani*, 130.6 (2010): 25-35,

¹¹Simon Sarajyan, Hayastan-ĉinastan. p’astarkner hatuk hamagorĉakcutyan ogtin (in Armenian), Armenia-China: arguments for special cooperation, *21-rd Dar* 5(45), (2012): 5-22

foreign policy,¹² and a short article by Alexanyan makes observations on trade relations between Armenia and China from 2000 to 2013.¹³

The lack of research demonstrates that the academic discussion on Armenia-China relations, especially after the commencement of the Belt and Road Initiative (BRI), is highly underrepresented.¹⁴ There is merely one book, written by Mher Sahakyan that focuses on Armenia's potential in participating in the BRI.¹⁵ It is the first substantial study about China-Armenia relations in the context of the BRI.

This contribution is intended to fill in the gap of emphasizing the importance of Armenia's intensified cooperation with China in the context of the BRI (Section 2) and invites Yerevan and Beijing to renegotiate the currently existing Armenia-China investment treaty for providing foreign investors a higher level of treatment in their territories (Section 3 & 4).

Belt and Road Initiative & China-Armenia relations

The Chinese "One Belt One Road Initiative" (OBOR) (also commonly referred as "Belt and Road Initiative" (BRI)) is the most significant and ambitious foreign policy goal created by China to date, which is set to draw bigger investment and trade scale than the Economic Co-Operation Act (better known as the Marshall Plan) had more than seventy years ago.¹⁶ The BRI is the largest development plan in modern history. It has a strong infrastructure building program underneath with a goal of connecting China with its neighboring countries all the way to Western Europe.¹⁷ In addition to financing support, investments, and

¹² Gor Sargsyan, *Činastani artak'in k'āga k'akanut'yan aranjnahatkut'yunnerē ew čin-haykakan haraberutyunner ē (1991-2010 t' t')* (in Armenian), Peculiarities of China's foreign policy and china-armenian relations (1991-2010), PhD Thesis, Institute of Oriental Studies, NAS RA (2012).

¹³ Lusine Alexanyan, *Hay-činakan mijpetakan arevtratntesakan haraberu t'yunnerē ew dranc' herankarnerē* (in Armenian), *Armenian-Chinese Inter-State Trade and Economic Relations and Prospects*, *EPH UGY Gitakan hodvacneri joxovacu*, 1.7 (10) (2015): 70-75.

¹⁴See e.g. Mger Saakjan, "Perspektivy Vovlechenija Armenii V Kitajskuju Inicijativu 'Odin Pojas, Odin Put'" (in Russian), *21-j Vek* No. 4(45) (2017); Mher Sahakyan, *Metak'si čanaparhi olorannerum* (in Armenian), *On the windings of Silk Road*, *Globus* 5 (84) (2017).

¹⁵ Mher Sahakyan, *Činastani Mek goti, mek čanaparh naxajernutyunē ew Hayastanē* (in Armenian), *China's One Belt, One Road Initiative and Armenia* (Yerevan: Noravank, 2018).

¹⁶ "Will China's Belt and Road Initiative outdo the Marshall Plan? How China's Infrastructure Projects Around the World Stack Up Against America's Plan to Rebuild Post-war Europe." *The Economist*, March 8, 2018, <https://www.economist.com/finance-and-economics/2018/03/08/will-chinas-belt-and-road-initiative-outdo-the-marshall-plan>.

¹⁷Peter Cai, "Understanding China's Belt and Road Initiative," *Lowy Institute for International Policy* (2017): 1-2.

other resources for infrastructure development, this initiative facilitates industrial, financial, and economic cooperation among the countries along the BRI.¹⁸ The geography of this initiative includes the African continent, Central Asia, Eastern Europe, South Caucasus (including Armenia), Middle East, Russia, South Asia, South East Asia,¹⁹ and China has also called on Latin American countries to join the initiative, making it a global program.²⁰

The BRI requires heavy capital investments, including projected \$1.3 trillion annually until 2030, which is a massive development finance initiative. The BRI initiative can be categorized by having the first continental roads and rails connecting China to Europe through Central Asia, by following the traditional “Silk Road route,” and the second route is the Maritime Silk Road, which connects Chinese ports to the Indian Subcontinent, goes through the Indian Ocean to Africa and crosses the Suez Canal, continuing on to Europe.²¹

The program was announced in President Xi’s speech in Astana on September 7, 2013 and a few days later at the summit of the Shanghai Cooperation Organization (SCO) in Bishkek on September 13, 2013.²² In the document called “Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road,” China announced that the 21st century is a “new era marked by the theme of peace, development, cooperation and mutual benefit” and that “the Belt and Road Initiative is a systematic project, which should be jointly built through consultation to meet the interests of all, and efforts should be made to integrate the development strategies of the countries along the Belt and Road” for reinforcing the Silk Road Spirit – “peace and cooperation, openness and inclusiveness, mutual learning and mutual benefit” carried through generations for thousands of years.²³

¹⁸Zeng Lingliang, “Conceptual Analysis of China’s Belt and Road Initiative: A Road Towards a Regional Community of Common Destiny,” *Chinese Journal of International Law* 15, no. 3 (2016): 517-541.

¹⁹ The Economist and Intelligence Unit Report, “One Belt, One Road: An Economic Roadmap,” March 2016, (available at http://www.iberchina.org/files/2016/obor_economist.pdf).

²⁰Rumi Aoyama, “‘One Belt, One Road’: China’s New Global Strategy,” *Journal of Contemporary East Asia Studies* 5, no. 2 (2016): 3-22.

²¹ Davies Gloria, Jeremy Goldkorn, and Luigi Tomba, eds. *Pollution: China Story Yearbook 2015*. ANU Press, 2016, in chapter “One Belt One Road: International Development Finance with Chinese Characteristics”, 245-250.

²²Zhenis Kembayev, “Towards a Silk Road Union,” *Chinese Journal of International Law*, 15, Iss. 3, (2016): 691–699.

²³ Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road, jointly released by the National Development and Reform

This initiative is directed first and foremost towards reinforcing China relations with its neighboring countries, strengthening economic ties, and security cooperation. The second policy objective behind the BRI is to strengthen and accelerate the pace of economic development in the central and western regions of China, which have been lagging behind the development pace seen in the Eastern and Coastal regions of China. Three important Chinese financial institutions play a key role in the process of attracting public and private funds to establish and successfully carry out projects: China Development Bank, the Asian Infrastructure Investment Bank (AIIB), and the Silk Road Fund.²⁴

Thus, within 5 years, Armenia has appeared in an economic reality that is not comparable with the situation it was in at any time in its history. The country is facing new challenges and there will be many opportunities that need to be taken advantage of in the coming decades that can boost its economic growth, mainly by enlarging its small market with lower trade barriers and reaching the more than 2 billion consumer market of BRI countries.

Armenia is considered one of the countries situated directly on the roadmap of the BRI, and one of the purposes of this section is to additionally stress the relative importance of the BRI for the country. Armenia currently has two infrastructure projects that can be potentially included among the BRI projects and financed for making it a transit country for foreign goods. The first project is the North-South Road Corridor investment program which intends to connect Armenia's southern border with Iran to the northern border with Georgia. The Road Corridor project is planned to be a 556km highway with an estimated cost of USD 1.5 billion and has been already initiated thanks to funding from Asian Development Bank, European Investment Bank, and Eurasian Development Bank.²⁵

For receiving direct access to the railroad of the BRI, Armenia needs to build a rail station to Iran, which requires an approximately USD 3.5 billion investment, a project that China might be interested in

Commission, the Ministry of Foreign Affairs and the Ministry of Commerce with the authorization of the State Council, the People's Republic of China on 28 March 2015 (http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html).

²⁴ Davies, Goldkorn and Tomba, "One Belt One Road: International Development ", 245-250.

²⁵ See e.g., Transport Project Implementation Organization, "North-South Road Corridor Investment Project" <https://tpio.am/en/projects/North-South-Road-Corridor-Investment-Program>

financing by including it in the framework of BRI projects.²⁶ The importance of direct access to the continental routes from China to Europe, Armenia will solve one of the biggest obstacles that the economy faces, which is a landlocked country with closed borders with Turkey and Azerbaijan.

The BRI will involve investments of about \$1.7 trillion in 2030,²⁷ which presents Armenia with an opportunity to renovate and build its infrastructure, connecting it to the road and railroad of the BRI, providing a long-term trade and investment opportunity with 80 BRI countries. Armenia can be considered as a favorable jurisdiction to BRI countries since it, first of all, provides a window to the Eurasian Economic Union, where Armenian goods can be transported tax-free. Additionally, Armenia recently signed an economic association agreement with the EU, which allows favorable conditions for trade in services. Thus, Armenia can also become an attractive destination for greenfield investments for Chinese enterprises.

In this context, the international investment agreements signed between Armenia and China will govern the relationship between the Chinese investors and government of Armenia, and thus in the next sections we will provide an analysis of the treatment standards in the Armenia-China investment treaty.

The Importance of International Investment Treaties: Armenia – China BIT

According to the World Investment Report, the global flow of FDI has reached \$1.75 trillion in 2016 and is projected to reach \$1.85 trillion in 2018, representing a massive financial flow between countries. However, this flow of cross-country finance is a relatively recent occurrence.

In Post-World War II times, the world was considerably segregated, there were certain country blocks that were trading and investing between themselves, and a truly global economic order was not yet established. One of the major roadblocks for such a development was based on the fact that investors were hesitant to invest their capital

²⁶ "China Interested in Iran-Armenia Rail Project," *Financial Tribune*, March 6, 2018, <https://financialtribune.com/articles/economy-business-and-markets/83024/china-interested-in-iran-armenia-rail-project>.

²⁷ See e.g., "Assessing Asia's Infrastructure Investment Needs", *Asia Development Blog*, February 28, 2017, <https://blogs.adb.org/blog/assessing-asia-s-infrastructure-investment-needs>.

abroad, due to the possibility of expropriation or confiscation of their property by the foreign countries' governments and lack of any remedies that investors could seek.

In the context of the segregated economic and investment order in the globe, bilateral and multilateral investment treaties have played and continue to play an essential role for the protection of investors' property rights in foreign states. Usually, those agreements incorporate a number of substantive treatment standards, resembling Treaties of Friendship, Commerce, and Navigation, with an essential addition. Bilateral investment treaties (BITs) and multilateral investment treaties (MITs) gave investors a direct recourse to bring claims against the host government in front of an impartial international arbiter. While having a global MIT has proven to be a challenging task, the countries mainly focused on creating a complex web of bilateral investment treaties which currently amount to more than 2,500 in total.

International investment agreements (IIAs) and the jurisprudence developed around them have created an international investment protection framework that allows investors to be confident that their capital in a foreign country will be protected and in the case of the host country breaching any of the treatment standards promised in IIAs, the investors could directly seek redress against the state.

This significant development in international economic law has stimulated scholars to research this relatively new field of law, and many scholars have studied the investment treaty practices of different countries and unions, such as the US, Canada, the Energy Charter, European countries, ASEAN, China, etc. These studies try to make sense of the international investment policymaking practices adopted by different countries, the treatment standards provided to foreign investors, and for making recommendations on modifications that should be made in particular countries' treaties in order to better reflect recent case law.

Armenia started its bilateral investment treaty (BIT) program in 1992 (it was signed with China), and Armenia currently has 42 signed BITs (35 of which are currently active) and 7 Treaties with Investment Provisions (TIPs).²⁸ This is a robust network of BITs. To put this into perspective, Armenia is an active BIT maker, with more than two BITs concluded annually starting from 1992.²⁹ While there are a number of

²⁸ For further updated details to the BIT statistics of China, refer to the following website: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/9#iiaInnerMenu>

²⁹ Germany, according to UNCTAD website currently has 135 signed BITs (129 in force).

economic, legal, and political implications of BITs, from the developing country's perspective, BITs are a concession to treat investments in an agreed upon manner that has the potential to promote higher investment and capital flow into the country's economy.³⁰

Broadly speaking, China has been one of the most active BIT makers in the world with over 129 signed BITs, only second to Germany. Through this practice, Chinese BITs have undergone four stages of development:

1. 1982-1989 that started with the launch of the BIT program,
2. 1990-1997 that started with China's accession to the ICSID,
3. 1998-present starting from the Going Global policy. During this period the treatment standards and ISDS clause have gradually shifted from restrictive standards towards more liberal ones.³¹ China remains a classic example of growing the country utilizing foreign direct investments, and the successful start of liberalization encouraged the state to continue this through gradually removing the restrictive nature of Chinese policies, implementing laws and regulations for foreign properties, investments, and enterprises. The changes in domestic law and the bilateral investment program implemented by China have greatly affected its overall attractiveness for foreign investors.³²

This change has also affected Chinese practice, where the BIT signed with Armenia³³(1992) has a number of substantial differences compared to the most recent Chinese BITs. Chinese BITs over decades have seen considerable change and evolution, changing from restrictive investment treaties to more liberal ones. The main drivers of change can be divided into three main parts:

1. domestic drivers of change, e.g., "opening up policy" and inbound investments; "going global policy" and outbound investments; the rise of the economic competitiveness of Chinese public and private enterprises,³⁴

³⁰ See generally, Kate Hadley, "Do China's Bits Matter-Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors Rights, and the Rule of Law," *Geo. J. Int'l L.* 45 (2013): 255-321; Bütte, Tim, and Helen V. Milner. "The politics of foreign direct investment into developing countries: increasing FDI through international trade agreements?" *American Journal of Political Science* 52.4 (2008): 741-762;

³¹Norah Gallagher and Shan Wenhua, *Chinese investment treaties: policies and practice*, (Oxford: Oxford University Press Vol. 35, 2009).

³²Kong Qingjiang, "Bilateral investment treaties: the Chinese approach and practice," *Asian YB Int'l L.* 8 (1998):106.

³³ China-Armenia BIT (1992).

³⁴ See e.g., Guiguo Wang, "China's Practice in International Investment Law: From Participation to Leadership in the World Economy." In *Looking to the Future*, Brill, 2010,

2. regional and global drivers of change (Chinese integration into the Asia Pacific as an important player; in a global context, Chinese negotiations with the USA, the EU, and TPP; accession to the WTO,

3. Experience in international relations as a driving force (accumulating the experience of China as a treaty-maker). Those changes were also supported by changes inside the national economy of China, by creating a more stable and open legal and economic system that foreign investors consider safe.³⁵

In the next section, we analyze the treatment standards included in the Armenia-China BIT (1992) focusing on its substantive treatment standards and the investor-state dispute settlement clause. We break through legal matters, placing them in the context of Chinese BIT-making policy and suggest an updated BIT, which will provide a higher level of protection to investors originating from those countries. The existing BIT is restrictive and provides a very low level of protection to foreign investors and has a limited investor-state dispute settlement clause.

The National Treatment Standard in the Armenia-China BIT

The National Treatment (NT) standard guarantees a level playing field among domestic and foreign investors, obliging the host states to provide foreign investors with treatment that is “not less favourable” or treatment “the same as” its own (domestic) investors. It creates competitive equality among foreign and domestic investors.³⁶ This standard has been qualified as the single most important standard of treatment contained in investment treaties which conveys how crucial this standard is.³⁷ NT is a relative standard of treatment that sets the minimum standard of treatment the same as its domestic investors, with the presumption that foreign investors can receive more favorable treatment, and not vice versa.

The NT standard in the context of the Chinese investment treaty has seen considerable discussion.³⁸ It has been established that the earlier

845-890; Huan, Guocang. "China's Open-Door Policy, 1978-1984." *Journal of International Affairs* (1986): 1-18.

³⁵Wenhua Shan, "Law and Foreign Investment in China: General Role of Law and Substantive Issues-Part One," *Manchester J. Int'l Econ. L.* 2 (2005): 41.

³⁶ United Nations Conference on Trade and Development (UNCTAD). "National Treatment" UNCTAD/ITE/IIT/11 (Vol. IV), (1999): 1; Zhou, Jian. "National treatment in foreign investment law: a comparative study from a Chinese perspective." *Touro Int'l L. Rev.* 10 (2000): 10, 39.

³⁷ Ibid, 2.

³⁸ For example, Wei Wang, "Historical Evolution of National Treatment in China," *Int'l Law.* 39 (2005): 759; Wenhua Shan, Norah Gallagher, and Sheng Zhang, "National

batch of Chinese BITs (most of the BITs signed before 1995) follow the practice adopted in the first Chinese Model BIT³⁹ and do not contain an NT clause. Statistically, less than half of all Chinese treaties contain an NT clause. The Armenia – China BIT follows the earlier Chinese BIT practice and does not contain an NT clause.⁴⁰ The absence of an NT clause allows both of the contracting parties to maintain full discretion upon providing a differential level of treatment and protection to domestic and foreign.⁴¹ Thus, it does not guarantee that foreign investors will not be discriminated against compared to domestic companies.

Most-Favoured-Nation Treatment Clause

The Most-Favoured-Nation (MFN) clause ensures a level playing field and the equality of competitive conditions among foreign investors that seek to make investments in a host state, by eliminating discrimination based on national considerations.⁴² MFN clauses ensure that the host state provides not less favorable treatment to investors originating from a foreign country than is provided to any other third state in the agreed space of relation covered by the treaty.⁴³ MFN is a relative standard, meaning that the scope of the clause is based on the host state's conduct towards third state investors.⁴⁴ Thus, as soon as the state provides more favorable treatment to a third state, it is automatically extended to all the other states that it has a treaty with. Consequently, if the state does not provide better treatment to any third state, the MFN clause does not have any practical importance.

The BITs signed between China and Armenia contains an MFN clause. However, it has limitations that can significantly restrict the scope of MFN clauses. First of all, the Armenia-China BIT adopts a post-establishment MFN clause, which applies only to investments that have

treatment for foreign investment in China: A changing landscape," *ICSID review* 27, no. 1 (2012): 120-144, etc.

³⁹ First Model BIT has been adopted by MOFCOM in the early 1980s.

⁴⁰ Armenia – China BIT (1992).

⁴¹ Lei Cai, "Where does China Stand: the Evolving National Treatment Standard in BITs?" *The Journal of World Investment & Trade* 13, no. 3 (2012): 374.

⁴² UNCTAD, *Most-Favored-Nation Treatment* (UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2010, 30).

⁴³ Organisation for Economic Co-operation and Development. *International investment law: a changing landscape; a companion volume to international investment perspectives*. OECD, 2005: 128.

⁴⁴ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012, 206).

already been made “in accordance to the laws and regulations” of the states. The post-establishment MFN clause does not cover the entry conditions of making the investment and does not materialize unless the investment is already made in the territory of the host state,⁴⁵ allowing the host country to preserve a great deal of discretion over the admission and establishment of foreign investment.⁴⁶

The second characteristic of the MFN clause in China-Armenia BITs is that the agreement does not specify whether the MFN clause can be applied to procedural clauses and the investor-state dispute settlement clause. It has become a recommended practice for BIT making to have this clarification due to the debates in the scholarly literature and inconsistent investment treaty jurisprudence.

Umbrella Clause

The umbrella clause presents the possibility that contractual agreements or commitments assumed by a state can be protected by the investment treaty, and a breach of those agreements can be considered as breaches of the treaty. By including an umbrella clause in an investment treaty, the countries can elevate the contractual undertaking into international law obligations.⁴⁷ It transforms the state’s responsibility towards a private investor under a contract into an international responsibility.⁴⁸ Thus, this clause becomes a protective umbrella (hence the name) for investment contracts or other undertakings of the state, a violation of which can be considered a violation of the BIT.⁴⁹ It is considered a well-established contention that not every contractual breach can amount to a breach of international law, but certain contractual breaches might amount to a breach of international law.⁵⁰

⁴⁵UNCTAD, *Most-Favored-Nation Treatment* (UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2010, 30).

⁴⁶ UNCTAD, *Key Terms and Concepts in IIAs: A Glossary* (UNCTAD Series on Issues in International Investment Agreements, New York and Geneva, 2004, 4).

⁴⁷Todd Weiler ed. *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron, May 2005, 326).

⁴⁸Joachim Karl, "The Promotion and Protection of German Foreign Investment Abroad," *ICSID review* 11, no. 1 (1996): 1-36.

⁴⁹Christoph Schreuer, "Travelling the BIT route of Waiting Periods, Umbrella Clauses and Forks in the Road," *J. World Investment & Trade* 5 (2004): 249-50.

⁵⁰Jarrod Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treat Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes," *Geo. Mason L. Rev.* 14 (2006): 145.

The Armenia-China BIT does not have an umbrella clause in its texts, which is a considerable limitation for the BIT, since it does not provide the level of protection explained above for Armenian and Chinese investors investing in these respective jurisdictions.

Fair and Equitable Treatment Clause

The Fair and Equitable Treatment (FET) standard has been qualified as an overarching principle that fills gaps and informs the understanding of specific clauses.⁵¹ Thus, the clause includes a very wide and ambiguous scope of protection for foreign investors giving tribunals the discretion to decide whether the state has treated the foreign investor fairly and equitably. Fair and equitable treatment is an absolute standard of treatment. The FET clause is inherently inflexible, it is a fixed rule, and it can only change when there is a change in interpretation of the rule in international law or when the language of the relevant treaty is changed.⁵² This protection can cover conduct that is arbitrary, grossly unfair, unjust or idiosyncratic, manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.⁵³

Due to the fact that the language of an FET clause varies from treaty to treaty, there is no universal meaning linked to the clause. Depending on the particular case and the BIT language, FET can be interpreted in three ways: (i) FET is a part of the minimum standard required by customary international law,⁵⁴ (ii) FET is a part of international law including all sources,⁵⁵ and (iii) FET is an independent, free-standing standard of treatment.⁵⁶ Some recent Armenian and Chinese investment treaties with other countries provide clarification on the interpretative scope of a FET clause.

However, contrary to this practice, the Armenia–China BIT is silent in this regard and does not clarify how the clause shall be

⁵¹Dolzer and Schreuer. *Principles of International Investment Law*, 123.

⁵²Argyrios Fatouros, *Government Guarantees to Foreign Investors* (Columbia University Press, 1962), 138.

⁵³*Waste Management, Inc. v United Mexican States (Number 2)*, ICSID Case No. ARB(AF)/00/3

⁵⁴ See e.g., FTC Note of Interpretation on 31 July 2001, Art. 1105; also see *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Dissenting Opinion of Samuel K.B. Asante, 583-584.

⁵⁵ See e.g., *EDF International SAUR International S.A. and Leon Participaciones v. Argentine*, Award of 11 June 2012, ICSID Case No. ARB/03/23.

⁵⁶ See e.g., *Saluka Investment B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006.

interpreted, which can be burdensome for tribunals for the interpretation in cases of investor-state disputes.

Full Protection and Security Clause

Full protection and security (PFS) clauses have particular applications for foreign investors in times of civil unrest, public disturbances, and violence, and can also include non-violent situations when investors are deprived of legal security and protection. It encompasses the damages caused to investors due to governments' unlawful actions or inactions that cause investors to suffer losses.⁵⁷

There have been considerable arbitral awards that interpret the FPS clause narrowly only to include protection against the *physical* security of the investment, and this has seen extensive discussion by a number of authorities in academia.⁵⁸ FPS clauses can also be interpreted more broadly to include legal protection, business protection, physical protection (police protection), and even economic regulatory powers.⁵⁹ The view of broader interpretation was advanced in arbitral decisions. In certain cases, tribunals merely admitted that the scope of FPS could be wider than physical security and, in other cases, the tribunals defined the wider scope to include also legal and business protection.

The Armenia – China BIT's FPS clause does not clarify whether the parties expect security limited to physical protection, or if protection go beyond that to include legal and business protection.

Nationalization and Expropriation Clause

Expropriation and nationalization can be defined as the outright physical seizure of an investor's property or its mandatory legal title transfer to the state or a state-mandated third party. However, some measures carried out by the state might not manifest as a physical seizure of the property but might substantially and permanently damage the interest of investor, highly decrease the economic value of its property,

⁵⁷ UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (New York and Geneva, 2005, 40-1).

⁵⁸ See e.g., Mahnaz Malik "The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?" *International Institute for Sustainable Development*, (2012): 7-9; Nartnirun Junngam, "The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully Protected and Secured From," *Am. U. Bus. L. Rev.* 7 (2018): 61-2.

⁵⁹ Thomas Wälde, "Energy Charter Treaty-based Investment Arbitration," *Transnational Dispute Management* 1, no. 3 (2004): 390-1.

and deprive the owner of the opportunity to manage or control its property in a meaningful way. Those state actions are called “indirect expropriation.”⁶⁰ The measures implemented by the state, while they might not qualify as direct expropriation, can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated,⁶¹ are called different names: “creeping”, “de facto” or “indirect” expropriation.

The Chinese-Armenia BIT contains the lawful expropriation standards according to customary international law. Accordingly, expropriatory measures carried out by the governments can be qualified as lawful if the measures were being carried out in the public interest, in accordance to the due process of law, on a non-discriminatory basis, and with appropriate compensation. The absence of any of those elements will qualify the measure as unlawful expropriation.

Investor-State Dispute Settlement Clauses

Investor-state dispute settlement (ISDS) clauses in investment treaties are probably the most significant treatment standard provided, which allow the investor to be able to bring a direct claim against the host state in front of international arbiters. The settlement of disputes between investors and the host state has been qualified as the key aspect of investment protection provided in international investment treaties.⁶² ISDS allows for the internationalization of investment disputes and a neutral forum, which are an essential layer of protection for investors’ assets in the territory of the host state, according to the substantive and procedural treatment standard spelled out in the treaty.⁶³

The Armenia–China BIT limits the dispute settlement clause to “disputes concerning the amount of compensation from expropriation,” which is a considerably restrictive approach. This formulation is very restrictive and allows the claimant to refer its case to international arbitration only related to the amount of compensation from expropriation,

⁶⁰ UNCTAD, *Expropriation* (UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2012, 5-7).

⁶¹ *Starrett Housing v. Iran*, Interlocutory Award No. ITL 32-24-1, 19 December 1983, 4 Iran-United States Claims Tribunal Reports 122, 154.

⁶² UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (UNCTAD Series on International Investment Policies for Development, New York and Geneva, 2005, 1).

⁶³ Valentina Vadi, "Critical Comparisons: the Role of Comparative Law in Investment Treaty Arbitration," *Denv. J. Int'l L. & Pol'y* 39 (2010): 71.

which is a high threshold and uncharacteristic of ISDS clauses in the 21st century.

Legal Urgency of a New BIT Between Armenia and China

The Armenia–China investment treaty follows the old model (first generation) of Chinese BITs where the countries adopted a protectionist and restrictive model of the treaty. This restrictiveness is well reflected in the fact that the BIT does not have a national treatment clause or umbrella clause. Additionally, the MFN, FET, and FPS clauses provide vague and outdated wording that can potentially be misinterpreted by investment tribunals. Most importantly, the ISDS clause provides the possibility for investors to bring claims against states only concerning the amount of compensation from expropriation. Those are considerable limitations and leave many aspects of investor rights protection uncovered by the agreement.

It is a well-justified objective for Armenia and China to formulate a new BIT that will be aimed at considerably updating the protective framework of investments, potentially becoming a stepping-stone for China to increase outward foreign investments to Armenia. This potential renegotiation of BITs needs to also be considered in the context of the Chinese BRI, which encourages the participation of state and private investors in long-term infrastructure deals and projects. Thus, additional assurances on the protection of foreign investors rights and assets can give comfort to private investors. Armenia, being at the crossroads of Chinese initiatives, has an opportunity to be a link between Asian, Middle Eastern, and European markets thanks to its geographical location.

Chinese rise in the global economic order, its increasing outward foreign investment, and BRI create a mutually beneficial relationship between the states that needs to be leveraged to provide a higher standard of treatment for foreign investors. This will additionally reinforce the party's relationship and will encourage Chinese investments in Armenia under the conditions of investor rights protection in accordance with the modern developments of investment treaties. Additionally, Armenia's recent accession to the Eurasian Economic Union and deepening trade relationship with Europe provide Chinese investors with a window to invest, produce goods and services in Armenia, and freely market them in both CIS and EU markets.

Conclusion

The Belt and Road Initiative is the largest infrastructure development plan in modern history that seems to create a robust financial and trade cooperation network. In this study, we emphasize the importance of Armenia's active participation for boosting its trade and investment realities with China and BRI countries. The BRI places Armenia in a fundamentally different geo-economic environment, which can be very fertile for attracting foreign investments. While the BRI has not yet crystalized or made a profound impact for Armenia, we argue that these key integration processes increase the relevance of investor rights protection in Armenia. Legal certainty and sound investor rights protection guarantees provided to foreign investors can increase the Chinese investor's willingness to invest in Armenia.

In this article, we discussed improvements that can be made in the Armenia–China investment treaty, considering that Armenia needs to intensify its efforts to attract Chinese investments and the BIT has considerable limitations that need to be corrected. The article focused on the substantive treatment standards and the investor-state dispute settlement clause of the bilateral investment treaty. We broke through legal matters, placing them in the context of Chinese BIT making policy and suggested that the parties need to update the BIT, which will provide a higher level of protection to investors originating from those countries. The existing BIT is restrictive and provides a considerably low level of protection to foreign investments originating from Armenia and China.